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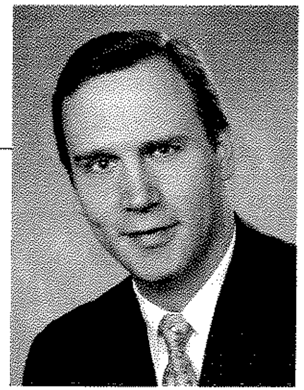


telephone solicitation on the line

top five lessons learned by developers in sales

by Joseph Sanscrainte

After five straight years of seemingly relentless regulation, what's the number one story for developers in sales that use the telephone as a marketing vehicle? Is it the ongoing battle between the FCC and the states over who has ultimate jurisdiction? Or perhaps the failure of the FTC and the FCC to finally get on the same page and harmonize their respective rules?

No—the number one story is that developers in sales have proven remarkably resourceful in responding to these regulations. The fact is, despite the new rules, the telephone has retained its position as a potent ingredient in the resort trade's marketing mix.

Developers in sales have done an excellent job in addressing compliance issues, and ARDA has been of tremendous assistance in this effort, serving as a clearinghouse for regulatory information. Rather than throw the baby out with the bathwater, the industry has retooled and regrouped as necessary to meet new regulatory mandates. Each new regulation is normally accompanied by a set of exemptions, none more important than the existing business relationship (EBR) and permission exemptions in the context of Do Not Call (DNC). The resort industry has excelled in taking full advantage of such exemptions, thus ensuring the continued viability of the telephone marketing channel.

Although the regulatory rollercoaster ride is far from over, there are a number of key lessons that have emerged.

THE SLIPPERY SLOPE OF LIABILITY

For anyone just tuning in, the FTC, FCC and the states have made it clear that, for DNC liability purposes, there is little difference between a seller and the outsourced entity that the seller hires to make calls on its behalf. Commenting on the FTC's first DNC enforcement action (against two timeshare sellers and the company they hired to make calls), FTC Chairman Deborah Platt Majoras opined: "You cannot hire subcontractors to break the law for you and then walk away free of consequences."

The response of the resort industry has been threefold. First, developers in sales have put their lawyers to work adding in, or tightening up, indemnification provisions in contracts with outside calling vendors. Although helpful, this does not prevent your company from making DNC enforcement headlines. It does, however, give your company the legal ammunition it needs to seek out reimbursement of penal-

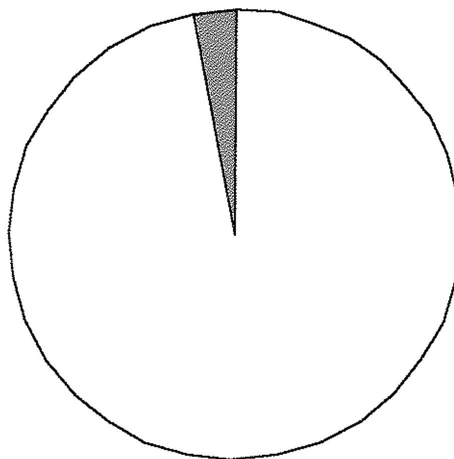
ties, and possibly loss of business and other damages, from the outside vendor.

The resort industry is also beginning to turn greater attention to reviewing the compliance measures taken by outside calling vendors prior to hiring. Just as important, this review should not stop once the vendor is hired—rather, random and scheduled monitoring should also be practiced to ensure that outside vendors are maintaining the level of compliance required. Requirements regarding the production of compliance reports (training, predictive dialers, etc.) at regular intervals should be included in vendor contracts as well.

Lastly, many in the industry are adding in contractual provisions requiring their vendors to employ certain technologies as part of their compliance efforts. An example of this would be requiring the use of only certain types and models of predictive dialers, to ensure compliance with federal abandoned call rules.

In a regulatory environment where even list brokers can be fined simply for providing lists to companies that subsequently committed fraud, the resort industry needs to be ever vigilant to ensure all of its vendors and subcontractors are complying with all facets of the telephone solicitation rules. It is well worth it to pay your outside vendor a little extra in recognition of an exemplary compliance track record than to face unnecessary "outsourcer" liability risk.

CALLS BLOCKED: SAMPLE OF RESORT TRADE CLIENTS THAT DEPLOY SCRUBBING



> "Despite the new FTC and FCC regulations, the telephone has retained its position as a potent ingredient in the resort trade's marketing mix."

THE DO NOT CALL ANTIDOTE: "PERMISSION-BASED" MARKETING

Consumer privacy advocates call them loopholes; the timeshare industry calls them lifesavers. The fact is, the EBR and express permission exemptions to the DNC rules represent a careful balancing of privacy concerns expressed by consumers on the one hand, and legitimate business needs on the other. For developers in sales, these exemptions provide the means to at least partially offset the impact of removing a significant percentage of phone numbers from prospect lists.

"Permission-based" marketing means many things to many people, but in the context of the telephone marketing channel, it means taking advantage of what the regulators give you. For developers in sales, proper use of the EBR exemption requires understanding the differences between state and federal rules, as well as tracking of the dates of transactions and inquiries to ensure compliance with "safe" contact periods.

The other main DNC exemption is express written permission, wherein consumers "opt in" in writing for telephone solicitation. Such permission is normally obtained in the form of a postcard or an e-mail, and it is playing a larger and larger role in generating prospects. Keep in mind, however, that although this sort of permission provides an "ironclad" excuse for contacting persons on DNC lists, there are several very important caveats.

First, the rules are very strict with regard to what constitutes "express" permission, and developers in sales must make sure that they not only follow these rules, but also maintain the records that establish this fact. Second, when dealing with e-mail forms of permission, companies must follow specific state rules regarding electronic signatures. Third, it is prohibited to use the national registry (and many of the state registries) for any purpose other than compliance with the federal DNC rules—in other words, do not attempt to contact these persons, via e-mail or otherwise, to attempt to generate permissions (or for any other reason). Finally, even though you have express permission from a consumer, any request by the consumer to be placed on your in-house DNC list trumps the written permission you have on file.

"SCRUBBING PLUS" AND DNC COMPLIANCE

DNC compliance has been long been the number one issue for developers in sales that use the telephone marketing channel. The recent action by the FCC against several timeshare entities has only raised the level of concern. There are two types of technologies available to help timeshare companies manage DNC compliance—scrubbing (database merging and purging) and blocking (screening calls against DNC databases as the calls are made)—and these have been used extensively by the resort industry over the past five years. What insights can be learned from the real-world experience of the resort industry in using these technologies?

Many timeshare companies have been the subject of DNC investigations and enforcement actions, certainly at the state level and now most recently at the federal level. Many, if not all, of these same com-

panies made use of some form of scrubbing. The obvious question is, why has scrubbing proven to be ineffective in ensuring compliance, at least for those companies that have been fined?

A review of a representative sampling of resort trade companies that scrubbed their lists but also deployed DNC blocking technology reveals the following: even though these companies scrubbed their lists, slightly more than 3 percent of the phone numbers dialed were blocked (see chart, below.)

There are many reasons why scrubbing misses such a significant number of DNC numbers, all of which might apply in different scenarios. To begin with, just a few short years ago, the only list that the resort industry had to contend with was the "in-house" list mandated under federal rules. Today, there are five types of DNC lists—the original in-house rules, the national registry, state lists (16 as of the time this article went to press) and for those entities making calls using predictive dialers, the set of area codes and exchanges assigned to cell phones, and the list of numbers recently ported from wireline to wireless service.

The sheer complexity of today's calling operations also plays a major role in the scrubbing conundrum. Most telephone operations today have to process multiple prospect lists at irregular intervals against multiple DNC lists, as well as collect in-house information on a regular basis from far flung offices (including, increasingly, overseas). This information then has to be disseminated back to these same offices, very often on a daily basis. Every IT professional knows that any "touch" of a database provides an opportunity for human and software error; as the number of "touches" increases, the chance for error increases exponentially.

The lessons learned by the resort industry indicate that the incongruously named "safe harbor" defense is of very limited use in the face of multiple consumer complaints. To make matters worse, the investigation that occurs as a result of these complaints may review calling activity going back at least six months, and any violation committed during that time frame will be uncovered. (The entities recently fined by the FCC were confronted with over 300,000 separate violations.) For a company that makes 100,000 calls per month, even a 1 percent error rate translates to ongoing liability exposure of $66,000,000.

The bottom line for the resort industry? Those companies that only scrub their prospect lists face a substantial likelihood that they are missing a significant percentage of DNC numbers, and therefore face an unacceptable level of risk. "Scrubbing plus" (scrubbing with an additional, real-time failsafe DNC system) would therefore appear to be required to meet the 100 percent level of compliance mandated under state and federal DNC rules.

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PROACTIVE COMPLIANCE IS THE BEST COMPLIANCE

The resort industry, as a whole, has done an excellent job of responding to the new rules and regulations governing the use of the telephone for marketing purposes. The rising sophistication of these same companies has led to them to consider what else can be done to ensure that they are in compliance, not just for DNC, but also for the many other areas of regulation that impact their calling operations. The answer is to move from "reactive" compliance to "proactive" compliance.

The first step to understanding how to achieve proactive compliance is to turn the compliance question on its head. Assume that you are being investigated for violations, and look at your operation from the perspective of the investigating agency. The second step is to employ a little reverse engineering. The FTC and the FCC have generated a significant paper trail in the course of their investigations and resulting consent decrees. By understanding what the FTC and FCC expect you to produce in the course of the investigation, as well as what policies and procedures they want in place in order to ensure ongoing compliance, your company will be well positioned to make the right compliance choices.

Employing proactive compliance will of course greatly reduce the potential for consumer complaints against your company, although nothing can reduce this risk to zero. This process can be developed either in-house, or with the aid of an outside law firm or consulting company. The latter two options provide third-party verification and also provide further evidence to an investigating agency that your company truly is deserving of safe harbor protection.

THE BEST INFORMATION IS THE LATEST INFORMATION

The number of telemarketing-related bills filed at the state level so far this year outpaces last year's total. It's clear that although the major elements of telemarketing laws are in place, legislators are not averse to a little fine-tuning. On the legislative agenda in 2005 are laws making DNC restrictions applicable to B2B calls, "location" disclosure bills, various privacy bills, and still, even though the federal registry has been up and running for over a year now, bills seeking to create separate, state-run DNC programs.

At the federal level, at the time this article went to print, the FCC was still considering a number of petitions seeking federal pre-emption of all state telemarketing rules. In the meantime, the FTC was considering another set of petitions, seeking clarification of various differences between its rules and the FCC's.

The only online source for the latest developments with regard to telemarketing-related legislation is the ARDA Regulatory Guide(SM). This guide provides information regarding over 20 separate compliance areas, and also generates "e-lerts" regarding any new legislation or regulations. (For more information, please visit www.arda.regulatoryguide.com.)

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